

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

KAK CONTRACTORS, INC.,

Respondent.

**Docket No. FMCSA-2010-0113¹
(Midwestern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On February 4, 2010, the Kansas Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on KAK Contractors, Inc. (Respondent).² The NOC, based on a December 8, 2009 compliance review, charged Respondent with one violation of 49 CFR 382.115(a), failing to implement an alcohol and/or controlled substances testing program, with a proposed civil penalty of \$2,000.

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Midwestern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on March 12, 2010.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding

¹ The prior case number was KS-2010-0009-KS0080.

² See Exhibit A to Field Administrator's Motion to Deny Respondent's Petition for Reconsideration of Default Order (hereafter Claimant's Motion to Deny Petition).

³ See Exhibit B to Claimant's Motion to Deny Petition.

effective March 17, 2010, with the civil penalty immediately due and payable on that date.

On April 1, 2010, Respondent served a Petition for Reconsideration.⁴ Respondent stated that it was not aware of § 382.115(a) and unsuccessfully attempted to obtain legal representation between February 4 and March 12, 2010. According to Respondent, it contacted three attorneys in the Topeka area during this period. All three attorneys “informed Respondent they had never heard of the regulation and could not give him legal advice on the matter.” Respondent was unable to obtain suitable legal assistance until March 16, 2010, and claimed that the NDFAO should be vacated because it exercised due diligence in seeking relief.

In his Motion to Deny the Petition, served April 20, 2010, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order. Respondent did not reply to the Motion.⁵

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).⁶ Therefore, it defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field

⁴ See Exhibit C to Claimant’s Motion to Deny Petition.

⁵ Although Claimant’s April 20 pleading is essentially an answer to the Petition, it was styled a Motion to Deny the Petition. The Agency’s Rules of Practice do not permit responses to answers, but do permit responses to motions.

⁶ The NOC reply deadline was March 11, 2010. This date was calculated by adding 30 days to the February 4, 2010 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that it could not obtain suitable legal representation until March 16, 2010—does not establish excusable neglect. Page 5 of the NOC clearly stated, in upper case letters, that Respondent must serve a written response to the NOC within 30 days and that failure to serve a timely reply may result in the issuance of a notice of default and final agency order declaring the NOC, including the civil penalty proposed therein, to be the final agency order in the proceeding. Although the NOC suggested that Respondent obtain legal representation if necessary, the failure to do so in a timely manner does not constitute excusable neglect.⁷

Respondent's statement that it was unaware of § 382.115(a) is not even close to a meritorious defense. Respondent had an obligation, as a regulated entity, to be knowledgeable about the motor carrier safety regulations applicable to its operations. Ignorance of the law is no defense. Consequently, Respondent did not present any meritorious defenses. Moreover, Respondent's Petition for Reconsideration, served


⁷ Respondent's claim that the first three attorneys it contacted had never heard of § 382.115(a) indicated that it made less than a conscientious attempt to obtain legal representation before the response deadline. Had Respondent shown any of these attorneys the NOC, it would have likely been advised of the need to file a timely reply.

approximately three weeks after service of the NDFAO, does not constitute due diligence in seeking relief.⁸

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁹ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.¹⁰

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹¹

It Is So Ordered.


Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

7.23.10
Date

⁸ See *In the Matter of J. Lazaro Trucking*, Docket No. FMCSA-2010-0004, Order Denying Petition for Reconsideration, April 15, 2010.

⁹ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

¹⁰ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

¹¹ The civil penalty is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

CERTIFICATE OF SERVICE

This is to certify that on this 26 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Kirk Keberlein, President
KAK Contractors, Inc.
6700 S. Topeka Blvd., Bldg. 818 N4
Topeka, KS 66619

One Copy
U.S. Mail

Peter W. Snyder, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
19900 Governors Drive, Suite 210
Olympia Fields, IL 60461

One Copy
U.S. Mail

Darin G. Jones, Field Administrator
Midwestern Service Center
Federal Motor Carrier Safety Administration
19900 Governors Drive, Suite 210
Olympia Fields, IL 60461

One Copy
U.S. Mail

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

Original
Personal Delivery